Supreme Court, U.S.
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No. 98-1812

In The

Supreme Court of the United States

MIR AIMAL KASI,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is there any compelling reason to review the Virginia Supreme Court's fact-specific application of this Court's decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), to a case where, at the time of his seizure in Pakistan in June of 1997, the petitioner was a non-resident alien who had fled the United States in January of 1993 to escape prosecution for murder and had abandoned any previous connection with this country?

2. Is there any compelling reason to review the Virginia Supreme Court's fact-specific application of the rule established by this Court in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992)?

3. Is there any compelling reason to review the Virginia Supreme Court's fact-bound rejection of petitioner's claim that an alleged violation of the Vienna Convention on Consular Relations requires the suppression of his confession?

4. Is petitioner's so-called "*Touhy*" claim defaulted and barred from review?

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STATEMENT OF THE CASE

On November 10, 1997, after a six-day trial, a jury in the Circuit Court of Fairfax County, Virginia, convicted the petitioner, Mir Aimal Kasi, of the capital murder of Frank Darling, the first-degree murder of Dr. Lansing Bennett, the malicious shootings of Nicholas Starr, Calvin Morgan and Stephen Williams, and the use of a firearm in each of those five offenses. On the first-degree murder conviction, the jury fixed Kasi's punishment at life imprisonment and a $100,000 fine. On each of the three malicious shooting convictions, the jury fixed punishment at 20 years imprisonment and a fine of $100,000. Kasi's punishment for the first firearms conviction was two years and four years for each of the other four convictions.

On November 14, 1997, after a separate three-day proceeding on the issue of punishment for the capital murder, the jury fixed petitioner's punishment at death based upon a finding beyond a reasonable doubt that his offense was "outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." *See* Va. Code § 19.2-264.4. On January 23, 1998, after considering a presentence report, the trial court sentenced Kasi in accordance with the jury's verdicts. Final judgment was entered by order dated February 4, 1998.

On November 6, 1998, the Supreme Court of Virginia unanimously affirmed Kasi's convictions and sentences. *Kasi v. Commonwealth*, 508 S.E.2d 57 (Va. 1998). The state court also ruled that Kasi's appeal with respect to his

non-capital convictions had not been perfected. *Id.* at 60. Kasi's petition for rehearing was denied on January 8, 1999.

STATEMENT OF FACTS[1]

On Monday, January 25, 1993, near 8:00 a.m., a number of automobiles were stopped in two north-bound, left-turn lanes on Route 123 in Fairfax County at the main entrance to the headquarters of the Central Intelligence Agency (CIA). The vehicle operators had stopped for a red traffic light and were waiting to turn into the entrance.

At the same time, a lone gunman emerged from another vehicle, which he had stopped behind the automobiles. The gunman, armed with an AK-47 assault rifle, proceeded to move among the automobiles firing the weapon into them. Within a few seconds, Frank Darling and Lansing Bennett were killed and Nicholas Starr, Calvin Morgan, and Stephen Williams were wounded by the gunshots. All the victims were CIA employees and were operators of separate automobiles. The gunman, later identified as defendant Mir Aimal Kasi, also known as Mir Aimal Kansi, fled the scene.

At this time, defendant, a native of Pakistan, was residing in an apartment in Reston with a friend, Zahed Mir. Defendant was employed as a driver for a local courier service and was

[1] The facts are taken verbatim from the Virginia Supreme Court's opinion. *Kasi*, 508 S.E.2d at 59-62. (Ptn. App. 1-2, 5-8).

familiar with the area surrounding the CIA entrance.

The day after the shootings, defendant returned to Pakistan. Two days later, Mir reported to the police that defendant was a "missing person."

On February 8, 1993, the police searched Mir's apartment and discovered the weapon used in the shootings as well as other property of defendant. Defendant had purchased the weapon in Fairfax County three days prior to commission of the crimes.

On February 16, 1993, defendant was indicted for the following offenses arising from the events of January 25th: Capital murder of Darling as part of the same act that killed Bennett, Code § 18.2-31(7); murder of Bennett, Code § 18.2-32; malicious woundings of Starr, Morgan, and Williams, Code § 18.2-51; and five charges of using a firearm in commission of the foregoing felonies, Code § 18.2-53.1.

Nearly four and one-half years later, on June 15, 1997, agents of the Federal Bureau of Investigation (FBI) apprehended defendant in a hotel room in Pakistan. Defendant had been traveling in Afghanistan during the entire period, except for brief visits to Pakistan.

* * *

Near 4:00 a.m. on June 15, 1997, Agent Garrett and three other armed FBI agents, dressed in "native clothing," apprehended defendant in a hotel room in Pakistan. Defendant responded to a knock on the room's door and the agents rushed inside. Defendant, who has "a master's degree in English," immediately began screaming in a foreign language and refused to identify

himself. After a few minutes, defendant was subdued, handcuffed, and gagged. Garrett identified him through the use of fingerprints. During the scuffle, defendant sustained "minor lacerations" to his arm and back.

When the agents left the hotel with defendant in custody, he was handcuffed and shackled, and a hood had been placed over his head. He was transported in a vehicle for about an hour to board an airplane. During the trip, Garrett told defendant he was an FBI agent.

The ensuing flight lasted "a little over an hour." After the plane landed, defendant was transferred to a vehicle and driven for about 40 minutes to a "holding facility" where he was turned over to Pakistani authorities. The FBI agents removed defendant's handcuffs, shackles, and hood when the group arrived at the holding facility, but the persons in charge of the facility put other handcuffs on him. Defendant was placed in one of the eight cells in the facility, where he remained until the morning of June 17.

During defendant's stay in the facility, the FBI agents never left his presence or allowed him to be interrogated or "harassed." He was allowed to eat, drink, and sleep. On two occasions, the agents removed defendant from his cell to "look at his back and look at his arm" and to take his blood pressure and pulse. The agents did not interrogate defendant in the holding facility and made certain he was treated "fairly and humanely."

On June 16, "late in the day," Garrett was advised by an official at the U.S. Embassy in Pakistan that defendant would be "released" the

next morning. On June 17 near 7:00 a.m., defendant "was allowed to be released" from the facility in the custody of the FBI agents. He was handcuffed, shackled, and hooded during a 15-minute ride to an airplane. Once on the plane, the hood was removed. Shortly after boarding the aircraft, a physician checked defendant's "well being."

During the 12-hour flight to Fairfax County, Garrett first conducted a "background" conversation with defendant, discussing "his life in the United States, where he lived, where he worked." Garrett knew, from his four-and-one-half-year search for defendant, that he was a Pakistani national. Defendant was not a U.S. citizen and he had not returned to the United States after he fled on January 26, 1993.

After the background conversation, Garrett advised defendant of rights according to *Miranda v. Arizona*, 384 U.S. 436 (1966). Defendant signed an FBI "Advice of Rights" form, after reading it and having it explained to him. He indicated he was waiving his rights and was willing to give a statement. The subsequent interview lasted about one and one-half hours before defendant signed a written statement summarizing the interview.

In the written statement, defendant confirmed he purchased the AK-47 rifle and about 150 rounds of ammunition several days before the incident in question. He said he drove his pickup truck to the scene, "got out of my vehicle & started shooting into vehicles stopped at a red light." Continuing, he stated that "I shot approximately 10 rounds shooting 5 people. I aimed for the chest area of the people I shot. I

then returned to my truck & drove back to my apartment." He also stated that "several days before the shooting I decided to do the shooting at the CIA or the Israeli Embassy but decided to shoot at the CIA because it was easier because CIA officials are not armed."

As part of his oral statement to Garrett, defendant enumerated political reasons "why he wanted to do this shooting." He said he was "upset" because U.S. aircraft had attacked parts of Iraq, he was "upset with the CIA because of their involvement in Muslim countries," and he was concerned with "killing of Pakistanis by U.S. components." When Garrett asked defendant "why he stopped shooting," he replied "there wasn't anybody else left to shoot." When asked about the gender of those shot, defendant replied "that he only shot males because it would be against his religion to shoot females."

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE VIRGINIA SUPREME COURT CORRECTLY RULED THAT THE FOURTH AMENDMENT DID NOT APPLY TO PETITIONER BECAUSE AT THE TIME OF THE CHALLENGED SEIZURE HE WAS A NON-RESIDENT ALIEN WHO HAD FLED THE UNITED STATES MORE THAN FOUR YEARS PREVIOUS IN ORDER TO ESCAPE PROSECUTION FOR THE MURDER OF UNITED STATES CITIZENS.

Petitioner contends that this Court should grant certiorari to resolve an alleged "conflict" between the Virginia Supreme Court's ruling in his case and the decisions

of the Florida Supreme Court in *Reichmann v. State*, 581 So.2d 133 (Fla. 1991), and the United States Court of Appeals for the Ninth Circuit in *United States v. Juda*, 46 F.3d 961 (9th Cir. 1995). According to Kasi, the supposed "conflict" to be resolved involves the issue of whether an alien has "standing" to challenge his seizure abroad if at one time he had substantial voluntary connections to the United States. (Ptn. 12-16). Petitioner's contention is baseless, however, because his case is nothing like either *Reichmann* or *Juda*, and the Virginia Supreme Court's decision in his case is entirely consistent with this Court's decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

Contrary to Kasi's allegation, the state court did ***not*** rule that he had no "standing" to raise a Fourth Amendment claim challenging his seizure in Pakistan. (Ptn. 12). What the Virginia Supreme Court ruled was that, under *Verdugo-Urquidez*, the Fourth Amendment simply did not apply given the particular facts surrounding his seizure. *See Kasi*, 508 S.E.2d at 63. (Ptn. App. 12). That conclusion was undeniably correct and does not warrant this Court's review. *See* Rule 10 ("certiorari will be granted only for compelling reasons").

In *Verdugo-Urquidez*, this Court held:

> The available historical data shows . . . that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.

> There is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory. . . .

494 U.S. at 266-267. According to Kasi, *Verdugo-Urquidez* is not dispositive here because, ***at the time of the crime in January of 1993***, he had "lived, worked, held a driver's license, maintained car insurance, invested in business, and participated in civic and religious activities in the United States as a legal alien for approximately two years." (Ptn. 15-16). This argument, however, completely misunderstands *Verdugo-Urquidez'* discussion of whether an "alien" might qualify as one of "the people" contemplated by the Fourth Amendment – a discussion which focused solely upon government actions ***in the United States*** against "resident aliens." *See* 494 U.S. at 270-271.

Here, the undisputed facts are that, when Kasi was seized by the FBI in Pakistan, he was a non-resident alien who had fled the United States in January of 1993 to escape prosecution for the murder of United States citizens, and had not returned to this country at any time during the more than four years before he was captured.[2] Kasi's focus on his alleged ties to the United States ***at the time of the crime*** is irrelevant. *See Verdugo-Urquidez*, 494 U.S. at 274-275 (Fourth Amendment does not apply

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[2] After a pretrial hearing, the state trial judge found as a matter of fact that Kasi "was last in this country four and a half years before the event that I'm calling the arrest. He's not a U.S. citizen. There's no evidence he had any contact with the United States in the intervening period of time and the arrest occurred in a foreign country." (Ptn. App. 48-49).

because "***[a]t the time of the search,*** [the defendant] was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was in Mexico") (emphasis added).

The Virginia Supreme Court's fact-specific application of *Verdugo-Urquidez* certainly is not in "conflict" with either *Reichmann* or *Juda*. In *Reichmann*, the Florida Supreme Court merely found that the Fourth Amendment applied to a German citizen who was challenging the validity of a search conducted in Germany shortly after he was arrested in Florida for murder. At the time of both his arrest and the seizure, the defendant was an alien ***residing in Florida***. *See Reichmann*, 581 So.2d at 135, 138.

The Ninth Circuit's decision in *Juda* is similarly inapposite. The only tangentially relevant ruling by the Court of Appeals in *Juda* was that "the Fourth Amendment's reasonableness standard applies to United States officials conducting a search affecting ***a United States citizen*** in a foreign country." *See Juda*, 46 F.3d at 968 (emphasis added). Kasi, of course, is not a United States citizen. The district court decision in *Juda* is likewise inapposite. There, the ruling upon which petitioner relies concerned an "investigation . . . directed against United States citizens or residents." *See United States v. Juda*, 797 F. Supp. 774, 781-782 (N.D. Cal. 1992). Once again, under *Verdugo-Urquidez*, it is the defendant's status at the time of the seizure that controls and, at the time of the petitioner's seizure by the FBI, he was neither a citizen nor a resident of the United States.

Petitioner's reliance upon *United States v. Barona*, 56 F.3d 1087 (9th Cir. 1995), also is misplaced. (Ptn. 13-14).

Indeed, *Barona* expressly acknowledges that what controls under *Verdugo-Urquidez* is the defendant's status "at the time of the extraterritorial search." *See Barona*, 56 F.3d at 1094. Moreover, the issue which *Barona* states that *Verdugo-Urquidez* left undecided is "whether ***a resident alien*** has undertaken sufficient obligations of citizenship or has 'otherwise developed sufficient connection with this country' " to be protected by the Fourth Amendment. *Id.* (emphasis added). That issue has absolutely nothing to do with Kasi because, at the time of his seizure in Pakistan, he had fled the United States more than four years previous in order to escape prosecution for murder and unquestionably had abandoned whatever connection to this country he ever had.

II. THE COURT BELOW CORRECTLY APPLIED *ALVAREZ-MACHAIN* AND CONCLUDED THAT THE TRIAL COURT WAS NOT DEPRIVED OF JURISDICTION OVER PETITIONER BY VIRTUE OF THE MANNER IN WHICH HE WAS SEIZED AND BROUGHT TO THE UNITED STATES.

The Virginia Supreme Court's opinion demonstrates that it correctly stated the rule established by this Court in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), and faithfully applied that rule to the particular facts of petitioner's case. *See Kasi*, 508 S.E.2d at 63. (Ptn. App. 10-12). There is, therefore, no "compelling reason" warranting certiorari review. *See* Rule 10 ("certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").

In *Alvarez-Machain*, this Court held that "a criminal defendant, abducted to the United States from a nation

with which it has an extradition treaty" does not acquire "a defense to the jurisdiction of this country's courts." *See* 504 U.S. at 657. The Virginia Supreme Court concluded that in petitioner's case, just as in *Alvarez-Machain* and *Ker v. Illinois*, 119 U.S. 436 (1886), the "defendant's seizure in a foreign country and his return to this country were not accomplished pursuant to an extradition treaty." *See Kasi*, 508 S.E.2d at 63. (Ptn. App. 11). Thus, the state court correctly reasoned that, under *Alvarez-Machain*, Kasi's claim could succeed only if an extradition treaty between the United States and Pakistan can be construed to prohibit "forcible abduction of people from the territory of the other nation" and to delineate "the consequences . . . if such an abduction occurs." *See Alvarez-Machain*, 504 U.S. at 662-663.

There is no extradition treaty directly between the United States and Pakistan. Kasi relies upon the 1935 treaty between this country and the United Kingdom. (Ptn. App. 71-86). Assuming, but not conceding, that this treaty applies to this case, it clearly does not prohibit the type of non-treaty seizure conducted by the FBI, any more than the extradition treaty between the United States and Mexico prohibited the abduction that occurred in *Alvarez-Machain*. *See* 504 U.S. at 664 (the treaty "does not purport to specify the only way in which one country may gain custody of a national of the other country for purposes of prosecution").

Kasi relies upon Article 8 of the United States-United Kingdom treaty. (Ptn. App. 76). That provision, by its express terms, clearly applies only to an "extradition" accomplished "under the provisions of this treaty." Kasi, however, was not "extradited" to the United States, his

return clearly was not accomplished "under the provisions of" an extradition treaty, and the treaty process simply never was invoked.[3] *See Alvarez-Machain*, 504 U.S. at 665 (explaining that an extradition treaty establishes "the procedure to be followed ***when the Treaty is invoked***") (emphasis added). The dispositive fact is that the treaty upon which Kasi relies "does not prohibit [his] abduction." *Id.* at 662. The court below, therefore, correctly rejected his jurisdictional challenge.

III. THERE WAS NO "VIENNA CONVENTION" VIOLATION IN PETITIONER'S CASE AND, EVEN IF THERE WERE, THERE WOULD BE NO CONSTITUTIONAL BASIS FOR REQUIRING THE SUPPRESSION OF HIS CONFESSION IN A STATE CRIMINAL TRIAL.

Petitioner contends that the FBI failed to advise him upon his seizure in Pakistan that he had the right under Article 36 of the Vienna Convention on Consular Relations (Vienna Convention), 21 U.S.T. 77, T.I.A.S. No. 6820 (Apr. 24, 1963), to contact the Pakistani consulate and, therefore, his confession to the FBI while en route to the United States should have been suppressed.[4] The Vienna

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[3] Indeed, on page 10 of Kasi's "opening brief" in the Virginia Supreme Court, he conceded: "The record is silent as to any request by any United States diplomat for the extradition of Kasi or his arrest by Pakistani authorities pursuant to the [extradition] treaty. . . . This abduction/seizure of Kasi was conducted . . . without invoking the procedures set out by the laws of each country." (Resp. App. 1-2).

[4] Kasi misstates the record when he asserts that "[o]ther than the statement given by petitioner after he was abducted by

Convention has no application under the particular facts of Kasi's case and, in any event, petitioner failed to make the required showing of "prejudice." A purported Vienna Convention violation, moreover, provides no constitutional basis for mandating an exclusionary rule in a state criminal proceeding.

As the Virginia Supreme Court found, after Kasi was seized by the FBI in Pakistan, he was taken "to a 'holding facility' where he ***was turned over to Pakistani authorities***" before he ultimately " 'was allowed to be released' from the facility in the custody of the FBI agents" and transported by airplane to the United States. *See Kasi*, 508 S.E.2d at 61 (emphasis added). (Ptn. App. 6). It was in this context that, when the Supreme Court of Virginia rejected Kasi's "Vienna Convention" claim, it concluded, "[I]t makes no sense to say that, when the defendant was arrested in Pakistan and turned over to Pakistani authorities, the Vienna Convention required defendant to be notified of his right to contact Pakistani consular officers, even if that country maintained a 'consulate' within its own borders." *See Kasi*, 508 S.E.2d at 64. (Ptn. App. 13).

The Vienna Convention has no application in the rare situation, like petitioner's, where a person is apprehended ***in his own country*** by agents of another country.

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the four FBI agents in Pakistan, no direct evidence placed the petitioner at the murder scene." (Ptn. 8). Angela Clark was an eyewitness to the shootings and she unequivocally identified Kasi as the gunman. (Resp. App. 2-3). *See Kasi*, 508 S.E.2d at 59 ("The gunman later identified as defendant . . . fled the scene"). (Ptn. App. 1). The record, moreover, is replete with Kasi's admissions that he was the shooter. (Resp. App. 4-6).

The treaty clearly contemplates situations where a foreign national of country A is arrested in country B, and requires the officials of country B to notify the arrestee that he may contact the local consulate of country A. As the Virginia Supreme Court concluded, it simply would have made no sense to require the FBI agents to inform Kasi that he had the right to contact the Pakistani "consulate," particularly where it is clear that at one point he was in Pakistani custody.[5] *See Kasi*, 508 S.E.2d at 64. (Ptn. App. 13).

In *Breard v. Greene*, 118 S.Ct. 1352, 1355 (1998), moreover, this Court held that "it is extremely doubtful that [a Vienna Convention] violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." The Court then rejected Breard's assertion that he was prejudiced by the treaty violation in his case because, if he had consulted with consular officials, "he [allegedly] would have accepted the State's offer to forgo the death penalty in return for a plea of guilty" – an assertion which this Court labeled "far more speculative than the claims of prejudice courts routinely reject." *Id.*

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[5] Kasi suggests that this Court should grant certiorari to review the Virginia Supreme Court's allegedly "erroneous" factual finding that, after seizing Kasi, the FBI temporarily relinquished custody to the Pakistani authorities. (Ptn. 18). Certiorari, however, "is rarely granted when the asserted error consists of erroneous factual findings. . . . " Rule 10. In any event, the record shows that Kasi expressly conceded in the state trial court that, after the FBI seized him in Pakistan, he temporarily was "put into Pakistani custody" and "given over to the government of Pakistan." (Ptn. App. 341).

In light of *Breard*, the Virginia Supreme Court correctly rejected Kasi's nonsensical assertion that, despite the fact that the Pakistani authorities clearly knew of and acquiesced in Kasi's seizure in Pakistan by the FBI and, even though Kasi was advised of and validly waived his *Miranda* rights, he nevertheless would not have confessed if only he had been told he could contact the Pakistani consulate. *See Kasi*, 508 S.E.2d at 64 ("defendant's suggestion . . . is just as speculative as the theory of 'prejudice' that the Supreme Court recently rejected in *Breard*"). (Ptn. App. 13). Indeed, there is absolutely no reason to believe that, if petitioner had been advised that he could contact the Pakistani consulate, he would have attempted to do so under the circumstances or that, even if he had made such contact, any assistance would have been forthcoming from the Pakistani authorities.[6] Nor is there any reason to believe that any contact with a Pakistani consulate would have provided Kasi with any information relevant to his right not to incriminate himself beyond what he was provided by the *Miranda* warnings, or would have caused him to invoke rather than waive his *Miranda* rights.

Finally, there simply is no authority for the proposition that a purported violation of the Vienna Convention provides a valid basis for an exclusionary rule created by

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[6] While Article 36 of the Vienna Convention requires the arresting authorities to inform a foreign national that he may contact the consulate of his country and that, if the foreign national indicates he wishes to make such contact, the arresting authorities must notify the consulate, nothing in the applicable provisions of the treaty requires that, once notified, the consular authorities must provide assistance. (Ptn. App. 100-102).

the federal judiciary and made applicable in a state criminal proceeding.[7] Petitioner's confession to the FBI was preceded by full *Miranda* warnings and a written waiver of his constitutional rights. In the court below, Kasi challenged the admissibility of his confession on Fifth Amendment grounds, and the Virginia Supreme Court rejected the claim as follows:

> First, defendant claims the statement was involuntary and was obtained through coercion. We do not agree.
>
> The evidence on the issue, presented both at a pretrial suppression hearing and during the guilt phase of the trial, was overwhelming and uncontradicted that defendant validly waived any constitutional rights he may have had in connection with the statement and that the statement was voluntary. No threats or promises were made to defendant, either when he was apprehended or aboard the aircraft, and he was

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[7] In cases involving the criminal prosecution of ***federal*** defendants, the few lower federal courts that have addressed the issue have been unanimous in holding that a purported Vienna Convention violation cannot possibly require the suppression of statements to the police without a showing of "prejudice." *See, e.g., United States v. Lombera-Camorlinga*, 170 F.3d 1241, 1244 (9th Cir. 1999); *United States v. Chen*, ___ F. Supp. 2d ___, 1999 U.S. Dist. LEXIS 5728, *12-14 (S.D. N.Y. 1999); *United States v. Tapia-Mendoza*, ___ F. Supp. 2d ___, 1999 U.S. Dist LEXIS 2852, *9-13 (D. Utah 1999); *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1999 U.S. Dist. LEXIS 2640, *9-12 (C.D. Ill. 1999); *United States v. Esparza-Ponce*, 7 F. Supp. 2d 1084, 1097 (S.D. Cal. 1998). None of these cases, of course, deals with the issue of whether, absent a ***constitutional*** violation, the federal courts may create and enforce an exclusionary rule with respect to a ***state*** criminal proceeding.

> not offered anything in return for his statement. Defendant, who "had good command of the English language," told Garrett that he "understood his rights fully and completely." He never refused to answer any question, and at no time during the 12-hour return flight did he express any fear or indicate he was making a statement because he was afraid. There is no evidence of coercion while he was detained in Pakistan. Indeed, the FBI agents were careful to assure he was treated humanely. The trial court's detailed findings of fact that the waiver was knowing, voluntary, and intelligent and that the statement was voluntary are fully supported by the record.

Kasi, 508 S.E.2d at 62. (Ptn. App. 8). Given the state court's rejection of petitioner's constitutional claim, a ruling which Kasi does not challenge in his certiorari petition, it is beyond question that the admission of his confession did not violate the Constitution.

As *Breard* makes clear, a purported treaty violation is not of ***constitutional*** magnitude, but rather "is on a full parity" with "an Act of Congress." *See Breard*, 118 S.Ct. at 1355; *see also Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir.) ("Although states may have an obligation under the Supremacy Clause to comply with . . . the Vienna Convention, the Supremacy Clause does not convert violations of treaty provisions. . . . into violations of ***constitutional*** rights. Just as a state does not violate a constitutional right merely by violating a federal statute, it does not violate a constitutional right merely by violating a treaty"), *cert. denied*, 521 U.S. 1144 (1997); *Esparza-Ponce*, 7 F. Supp. 2d at 1097 ("a violation of the Convention does not rise to the level of a *Miranda* violation").

Miranda's judicially-created exclusionary rule is warranted only because it is designed to safeguard ***constitutional*** rights. *See generally Withrow v. Williams*, 507 U.S. 680, 691 (1993) ("*Miranda* safeguards 'a fundamental trial right' "); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (*Miranda* rights are "not themselves rights protected by the Constitution, but [are] measures to insure that the right against compulsory self-incrimination [is] protected"). Because Kasi's confession was obtained by the FBI in full compliance with the Constitution and *Miranda*'s prophylactic rule, his treaty-based claim cannot support an exclusionary rule created and enforced by the federal courts for the benefit of a state criminal defendant.[8] *See United States v. $69,530*, 22 F. Supp. 2d 587, 595 (W.D. Texas 1998) ("The 'judicially created remedy' of exclusion of evidence obtained in violation of the Constitution has never been applied to violations of the Vienna Convention. . . . The exclusionary rule is designed to protect core constitutional values; it should only be employed when those values are implicated").

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[8] The Vienna Convention neither expressly nor implicitly provides for such an exclusionary rule. (Ptn. App. 101-102). *See United States v. Adamaj*, 170 F.3d 58, 67 (1st Cir. 1999) ("the Vienna Convention itself prescribes no judicial remedy or other recourse for its violation, let alone vacatur of a conviction"). Indeed, the preamble to the treaty expressly recognizes that "the purpose" of the "privileges and immunities" provided by the treaty "is ***not to benefit individuals*** but to ensure the efficient performance of functions by consular posts on behalf of their respective states." (Ptn. App. 100, emphasis added).

IV. PETITIONER DID NOT RAISE HIS SO-CALLED *"TOUHY"* CLAIM IN THE VIRGINIA SUPREME COURT.

Kasi asks this Court to review his claim that the trial court's failure to compel the FBI and the CIA to produce documents denied him his "constitutional rights to exculpatory and mitigating evidence." (Ptn. 21). According to petitioner, this Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), does not mean that a state court cannot compel a federal agency to produce documents. He argues that the state trial court's conclusion that it could not hold the FBI or the CIA in contempt for failure to provide documents pursuant to a subpoena deprived him of potential exculpatory or mitigating evidence. No such claim, however, was raised in the court below and, therefore, certiorari review is barred. *See Yee v. Escondido*, 503 U.S. 519, 533 (1992); Rule 14.1(g)(i) (requiring petitioner to specify when and how federal claim was raised in state court).

Petitioner filed 92 assignments of error in the Virginia Supreme Court and purported to raise all but one of them in his appellate brief. *See Kasi*, 508 S.E.2d at 60. (Ptn. App. 4). The only assignment of error, however, that even remotely relates to the claim he has raised in his certiorari petition was assignment no. 2 which alleged that the state trial court "erred in not holding the CIA in contempt for failure to respond to a valid subpoena." (Resp. App. 1). No mention was made of the FBI, no attempt was made to couch Kasi's claim in constitutional terms, no assertion was made that the trial judge had concluded he lacked

the authority to hold the CIA in contempt, and no allegation was raised regarding either "exculpatory" or "mitigating" evidence.

In his appellate brief, Kasi's assignment of error received only the following cursory treatment which was relegated to a footnote: "Error is assigned to the trial court's failure to hold the CIA in contempt for its failure to respond to a valid subpoena duces tecum." (Resp. App. 1). Again, no mention was made of the FBI or the trial court's authority (as opposed to its "failure") to hold the CIA in contempt. And, although Kasi did mention the Constitution in a perfunctory manner, he did not refer to either a due process right to disclosure of exculpatory evidence or an Eighth Amendment right to present mitigating evidence. Instead, he referred only in conclusory fashion to the Sixth Amendment rights to call for evidence in his favor and to confront his accuser. (Resp. App. 1). The Virginia Supreme Court disposed of assignment of error no. 2 as one of a group of claims upon which Kasi "effectively presented no meaningful argument" and which the Court found to have "no merit." *See Kasi*, 508 S.E.2d at 60. (Ptn. App. 4).

Under well-established rules of Virginia appellate procedure, the Virginia Supreme Court will not review on appeal any claim that is not encompassed by an assignment of error. *See Sheppard v. Commonwealth*, 464 S.E.2d 131, 135 (Va. 1995) (refusing to decide any claim not encompassed by "the original assignments of error"), *cert. denied*, 517 U.S. 1110 (1996). Because Kasi's assignment of error no. 2 in the court below failed to raise a constitutional claim and does not even remotely resemble the claim he has raised in his certiorari petition, the latter is

not properly before this Court.[9] *See Yee*, 503 U.S. at 533; Rule 14.1(g)(i).

Kasi devotes nearly a third of his petition to an exposition of this Court's decision in *Touhy*,[10] a survey of the lower federal courts' allegedly unwarranted "expansion" of that ruling, and an argument why his case supposedly is an appropriate vehicle for clarifying the *Touhy* rule. (Ptn. 21-30). ***Nowhere in petitioner's brief in the Virginia Supreme Court, however, did he cite or even obliquely refer to*** *Touhy*. Indeed, to the limited extent Kasi even mentioned his claim in a footnote to his brief, he failed to cite ***any*** case authority in support of it. (Resp. App. 1).

Under these circumstances, regardless of what this Court ruled in *Touhy* or how that ruling has been interpreted and applied by the lower federal courts, it is nothing short of frivolous to suggest that the Virginia Supreme Court's ***judgment*** in Kasi's case provides an appropriate vehicle for reviewing his newly-minted *"Touhy"* claim. *See Black v. Cutter Laboratories*, 351 U.S.

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[9] Therefore, the Virginia Supreme Court's "no merit" ruling necessarily was restricted to the conclusory, non-constitutional claim relating solely to the CIA which was raised in Kasi's assignment of error. This Court does not have jurisdiction to review such a non-constitutional claim. *See generally Mansell v. Mansell*, 490 U.S. 581, 587 (1989) (noting that this Court has no jurisdiction over matters of state law).

[10] Kasi inaccurately asserts that *Touhy* dealt with the power of a ***state*** court to hold a federal agency in contempt. (Ptn. 22). *Touhy* dealt with the power of a ***federal district court*** to hold a federal agency in contempt in connection with a habeas corpus proceeding involving a state prisoner. *See Touhy*, 340 U.S. at 464.

293, 297-298 (1956) (purpose of certiorari is to review "judgments"). It simply is impossible to conclude that the Virginia Supreme Court's decision has anything to do with the elaborate constitutional claim Kasi has constructed in his certiorari petition.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Commonwealth of Virginia

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[11] In any event, the "factual" predicate for petitioner's claim that he somehow was deprived of information to which he was constitutionally entitled is based upon his assertions that "the CIA, through . . . Pakistan's intelligence . . . and national security service, sought the aid and assistance of the petitioner and members of his family" during the war in Afghanistan and that "the CIA is believed to be responsible" for the killing of one of petitioner's relatives after that war. (Ptn. 6-7). As support for these assertions, however, he cites only a newspaper article which expressly was based upon mere speculation. (Ptn. App. 483: "Some press accounts have alleged that . . . " and "local reports subsequently speculated that . . . "). Thus, even if Kasi's claim were not defaulted, he clearly has presented no compelling reason warranting certiorari review.

RESPONDENT'S APPENDIX

EXCERPT FROM PETITIONER'S ASSIGNMENTS OF ERROR FILED IN VIRGINIA SUPREME COURT ON MAY 1, 1998:

ASSIGNMENTS OF ERROR

* * *

2. The Circuit Court erred in not holding the CIA in contempt for failure to respond to a valid subpoena.

EXCERPTS FROM PETITIONER'S VIRGINIA SUPREME COURT BRIEF IN *KASI V. COMMONWEALTH*:

[p. 3, fn. 2]

Error is also assigned to the trial court's failure to hold the CIA in contempt for its failure to respond to a valid subpoena duces tecum; there was no attempt to determine what authority the court might have and to use it to ensure that this defendant would be able to "call for evidence in his favor" and confront his accuser in accordance with the United States and Virginia Constitutions.

[p. 10]

The record is silent as to any request by any United States diplomat for the extradition of Kasi or his arrest by Pakistani authorities pursuant to the treaty or any "such other manner" or understanding between the two nations. There is further no record of the assent of Pakistan to this method of arrest.

This abduction/seizure of Kasi was conducted outside and in express violation of the Extradition Treaty

between the United States and Pakistan and without invoking the procedures set out by the laws of each country;

EXCERPT FROM TRANSCRIPT OF TRIAL TESTIMONY OF ANGELA CLARK ON NOVEMBER 5, 1997:

[p. 63]

ANGELA CLARK

a witness, was called for examination by counsel on behalf of the Commonwealth, and, after having been duly sworn by the Clerk of the Court, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. HORAN:

Q. State your full name, please, for the record.

A. Angela Clark.

[pp. 65-66]

Q. Now, was anyone with you in your car that morning?

A. No.

Q. And as you were stopped at that light, did anything unusual occur?

A. Yes. I noticed – when a car pulled up almost directly beside me – I noticed a man get out of that car,

open his car door and get out, with a gun. I then noticed him raising the gun and shooting through the back window of the vehicle in front of me. He then proceeded up the line of cars and between those cars, shooting, and then back down the line of cars, continuing to shoot. He then got back to his car and drove away from the scene.

Q. Did you get a look at that man?

A. Yes, I did.

Q. Was there anything that interfered with your ability to see him and see his face?

A. No, other than the fact that he was wearing glasses at the time.

Q. Do you think you would recognize him if you saw him again?

A. Yes, I do.

Q. Do you see him in this courtroom?

A. Yes.

Q. Would you point him out, please?

A. (Indicating.)

MR. HORAN: Let the record show that she identified the Defendant.

THE COURT: Yes.

EXCERPTS FROM TRANSCRIPT OF TESTIMONY OF DR. NEIL BLUMBERG ON NOVEMBER 12, 1997:

[p. 204]

NEIL BLUMBERG, M.D.

a witness, was called for examination by counsel on behalf of the Defendant, and, after having been duly sworn by the Clerk of this Court, was examined and testified, as follows:

DIRECT EXAMINATION

BY MS. BARGER

Q. Can you please introduce yourselves [sic] to the jury and spell your last name for the court reporter?

A. My name is Neil Blumberg, B-L-U-M-B-E-R-G.

CROSS EXAMINATION

[pp. 269-271]

Q. Did he tell you that on the day he did this, he was torn between whether he should shoot up the Israeli Embassy or the CIA?

A. He didn't tell me that on the day that he did this he was torn up. However, he certainly did, prior to making the decision to go to the CIA, considered shooting up the Israeli Embassy.

Q. Did he tell you that the reason he picked the CIA rather than the Israeli Embassy is he figured the CIA employees wouldn't be armed?

A. Yes, that's what he told me.

* * *

Q. He pulled up behind the right-hand lane of vehicles and got them while they were sitting in their cars at the light.

A. Yes.

Q. And that's what he told you?

A. That among many other things, yes.

Q. And he told you he shot five or six people?

A. Yes.

Q. He told you he fired ten to fifteen rounds?

A. I don't recall off-hand how many rounds he told me that he fired. What he told me is that he kept shooting until there was nobody else around to shoot at.

TRANSCRIPT OF PETITIONER'S ALLOCUTION ON JANUARY 23, 1998:

[pp. 17-18]

THE COURT: Is there anything you want to say?

THE DEFENDANT: I condemn the American government for the taking Islamic countries again and again and killing innocent people there and imposing economic sanctions on Islamic countries directly and through the United Nations to damage the economies of Islamic countries. And the CIA attack is the result of the

wrong policy of the American government towards Muslims, and I don't feel proud for it, and I have not told anybody I feel proud for it.

THE COURT: Is there any reason I should not sentence you today?

THE DEFENDANT: Regarding the CIA incident, I don't expect justice from the courts of this country because it was – it is the result of the wrong policy of the American government towards Muslims.